UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NOEL VELASQUEZ, et al., Plaintiff,	:	**Docket#** 11-CV-3892(LDW)(AKT)
- versus -	:	U.S. Courthouse Central Islip, New York
DIGITAL PAGE, INC., et al., Defendant	:	April 26, 2012

TRANSCRIPT OF CIVIL CAUSE FOR CONFERENCE
BEFORE THE HONORABLE A. KATHLEEN TOMLINSON
UNITED STATES MAGISTRATE JUDGE

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THE CLERK: Civil Cause for Status Conference, Velasquez, et al. v. Digital Page, Inc., et al., under 11-cv-3892.

Counsel, appearances.

MR. VAGNINI: James Vagnini and Justin Levy for the plaintiffs.

THE COURT: Good morning.

MR. LABUDA: Good morning, your Honor.

Joseph Labuda for the defendants.

THE COURT: Good morning. Have a seat. We have a lot of ground to cover today. So, I'm going to get right into it.

First of all, dealing with the class -- I should say the collective action certification, excuse me, on August 12, plaintiffs Noel Velasquez and Carlos Rivera brought this action against defendants Digital Page, Inc., Cellular Consultants, Inc. or CCI, Cellular Consultants of Nassau, Inc., which I will refer to as CC of Nassau, Cellular Consultants of Nassau ST 1, which I will refer to as CC of Nassau ST -- I don't know, is it I or 1 here? I'm trying to figure that out. Do you know?

MR. VAGNINI: I'm not sure, your Honor.

THE COURT: All right. And Cellular Consultants of Farmingdale, which I will refer to as CC of Farmingdale, along with Brandon Haenel and Robert

Pachtman, for failing to properly compensate them and others similarly situated regarding overtime pay in violation of the FLSA and the New York Labor Law.

Each of the defendant entities are alleged to be doing business under the name Fusion Wireless. Haenel and Pachtman allege to have an ownership -- correlation of ownership stake in Fusion Wireless.

The complaint alleges that the defendants Digital Page, CCI, CC of Nassau, and CC of Nassau ST I, are all located at 65 Main Street, Port Washington, whereas CC of Farmingdale is located at 1709 Crosby Avenue in the Bronx.

There appears to be a typographical error in the complaint. Based on a reading of the complaint as a whole, the November 28, 2011 declaration of Brandon Haenel which is a DE-29 and the December 22, 2011 affidavit of Carlos Rivera, which is DE-25, Exhibit 1, in those documents it appears that Digital Page is actually located at 1011 Port Washington Boulevard and not 65 Main Street.

In addition to the locations at 65 Main Street and 1709 Crosby Avenue, plaintiffs allege that Fusion Wireless has five other locations; 1011 Port Washington Boulevard in Port Washington, 99 Nassau Street in New York, 4260 Broadway, New York and 514 Union Boulevard,

West Islip and 387 Independence Boulevard in Selden.

On December 22, 2011, the plaintiffs moved, among other things, for a collective action certification and for notice to be sent to putative collective action members, pursuant to 29 USC Section 216(b).

I note first of all, that no where in the motion papers do the plaintiffs define the class. The Court went back therefore, to the complaint, which seeks conditional certification of a class consisting of "current and former employees of defendants who perform any work in any of defendant's locations as non-managerial employees who give consent to file a cause of action to recover overtime compensation which is legally due them for the time worked in excess of forty hours in a given work week." That's at paragraph 16 of the complaint.

Collective actions under the FLSA are authorized by Section 216(b) which provides in pertinent part as follows:

"An action may be maintained against any employer by any one or more employees for and on behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the

Court in which such action is brought."

As such, district courts have discretion to authorize the sending of notice to putative plaintiffs. See, for example, Myers v. Hertz Corp. 624 F.3d 537 at 554 (2d. Cir 2010) quoting Hoffman-LaRoche v. Sperling 493 US 165.

Courts within the Second Circuit apply a two-step analysis to determine whether an action should be certified as an FLSA collective action. See for example, Bifulco v. Mortgage Zone, Inc. 262 FRD 209 at 212 (EDNY 2009) and Rubery v. Buth-Na-Bodhaige, Inc., 569 F.Supp. 2d 334, 336 (WDNY 2008).

First, the Court looks at the pleadings and affidavit to determine whether the putative (ph.)s are similarly situated to the named plaintiffs. See Lewis v. National Financial Systems, Inc. 2007 Westlaw 2455130 at *2. That's an August 27, 2007 case from the eastern district. See also Rodolico v. Unisys Corp. 199 FRD 468 at 480. That's a 2001 case from the eastern district.

If the Court decides in the affirmative, then the proposed class members must consent in writing to be bound by the result of the suit or opt-in. The second step, which typically occurs after the completion of discovery involves the Court making a factual finding

based on the developed record as to whether the opt-in plaintiffs are actually similarly situated to the named plaintiffs. That's from Bifulco at 262 FRD at 212.

The instant motion concerns only the first step, whether the proposed class members are "similarly situated", such that conditional certification should be granted. At this stage, the evidentiary standard is lenient. That's from Rubery 569 F.Supp 2d at 336 and the plaintiffs need only make a modest factual showing sufficient to demonstrate that they and potential plaintiffs together were victims of a common policy or plan that violated the law. That is from Doucoure v. Matlyn Food, Inc. 554 F.Supp 2d 369 at 372 (EDNY 2008) quoting Hoffman v. Sbarro 982 F.Supp 249 at 261 (SDNY 1997). "In making this showing, nothing more than substantial allegations that the putative class members were together, the victims of a single decision policy or plan is required."

Sexton v. Franklin First Financial Ltd. 2009 Westlaw 1706535 at *3, Eastern District of New York June 16, 2009. This determination is typically based on the pleadings, affidavits and declarations. See Sexton 2009 Westlaw 1706535 at *3. See also Guan Ming Lin, a case which I am going to refer to again shortly which is an important case, Guan Ming Lin v. Benihana 755 F.Supp 2d.

504 at 509 (SDNY 2010), finding that for plaintiffs to make the necessary factual showing, they can rely on the pleadings but only as supplemented by other evidence such as affidavits from named plaintiffs, opt-in plaintiffs or other putative collection action members.

Essentially, the burden of proof here is not a stringent one and the Court need only reach a preliminary determination that potential class members are similarly situated. In support of the motion, plaintiffs submit their own affidavits, as well as an affidavit from Michael Nozario (ph.), a purported employee of Fusion Wireless who filed a consent to join form on October 5, 2011.

Plaintiff Velasquez was hired by CCI as a sales associate in 2008. That's both from the complaint and from his own affidavit. Velasquez states that he worked at CCI from January 2008 until January 2010. His work duties at CCI included sales and customer service. Velasquez states that he was required to work five or six days per week, averaging between fifty and sixty hours. In the complaint, Velasquez states that his hours corresponded with CCI's regular business hours which were 9 a.m. to 8:00 p.m. on the weekdays, 9 a.m. to 7:00 p.m. on Saturday and 11 a.m. to 4:30 p.m. on Sunday. Despite working over forty hours each week, Velasquez alleges

that he was only compensated at his straight rate of pay for those hours worked over forty. That rate of pay was $10 per hour until April 17, 2010 when Velasquez got a raise to $11.50 per hour.

Plaintiff Rivera was hired by Digital Page as a communications specialist in 2009; again, from the complaint, as well as his own affidavit. Rivera worked at Digital Page from the end of 2009 until April 1, 2011. His work duties included maintaining the store, repairing phones, inventory and sales. Rivera states that he was required to work five to six days per week, averaging between fifty and sixty hours. When he was assigned to work six days a week, Rivera claims to have worked closer to seventy hours. Rivera's alleged hours correlated with a Digital Page's hours of business which were in from 9:00 a.m. to 8:00 p.m. on the weekdays, 9:00 a.m. to 7:00 p.m. on Saturday and 11 a.m. to 4:30 p.m. on Sunday.

Despite working over forty hours each week, Rivera also alleges that he was only compensated at his straight rate of pay for those hours worked over forty. Rivera's rate of pay was $9 per hour.

Plaintiffs also submit an affidavit from Michael Nozario, a purported employee of digital page from the end of January 2010 to August 31 of 2010. There appears to be a great deal of confusion surrounding

Nozario's employment. Nozario claims that he worked for a time at a Digital Page store located at 1709 Crosby Avenue. However, the complaint alleges that CC of Farmingdale was located at 1709 Crosby Avenue. Further, despite Nozario stating that he approached defendant Haenel about his pay -- that's from his declaration at paragraph 10 -- defendant Haenel maintains that Digital Page only performs business at 1011 Port Washington Boulevard and that Nozario was never employed by Digital Page or CCI.

In response to Haenel's declaration, the plaintiffs submitted various paystubs of Nozario. Unfortunately, these pay stubs only add to the overall confusion. Three pay stubs dated February 5, February 19 and March 12, 2010 were issued on behalf of CC of Nassau located at 65 Main Street. However, for two pay stubs dated April 16 and May 14, 2010, the checks were issued on behalf of CC of Nassau ST I, located at 65 Main Street. Nozario's June 18, 2010 pay stub shows yet another change. The check is issued on behalf of CC of Farmingdale located at 65 Main Street. Lastly, Nozario's July 16 and August 20, 2010 pay stubs indicate the checks were issued on behalf of CC of Farmingdale, now located in the Bronx at 1709 Crosby Avenue.

Nozario alleges that he worked at Digital Page

Stores located at 99 Nassau Street and 1709 Crosby Avenue. At the Nassau Street store, Nozario states that was a sales associate responsible for selling phones. At this location, Nozario alleges to have worked on average fifty to sixty hours per week. His hours correlated with the store's hours of business, which were from 9:00 a.m. to 8:00 p.m. on the weekdays, 9:00 a.m. to 7:00 p.m. on Saturday and 11:00 a.m. to 4:30 p.m. on Sunday.

At the Crosby Avenue store, Nozario claims to have been the only employee at this store from June 1, 2010 to the last week of July 2010. During this time, Nozario maintains that he worked all business hours, seven days a week, which averaged approximately 75 hours. During the last week of July 2010, another employee was hired, resulting in Nozario then having Sundays off.

Similar to the named plaintiffs, Nozario claims that despite working over forty hours each week, he was only compensated at his straight rate of pay for those hours worked over forty. According to Nozario, his rate of pay was $9 per hour. However, Nozario also indicates in his affidavit that commission payments were added to the last paycheck each month.

Plaintiffs assert that all of defendant's non-managerial employees were required to work over forty hours per week and were not compensated at the required

time and a half pay for hours over forty per week.

First, I find that the defined class here is both overly broad and ambiguous. The terms "non-managerial employees" covers a multitude of possibilities, none of which are clarified by these motion papers. Taken to its logical inference, this class could include secretaries, clerical workers, maintenance staff, receptionists, et cetera.

The only common identifier referred to subsequently is the term "sales associate". Perhaps that is the intended class. The Court has no way of knowing here.

The submitted evidence fails to make the modest factual showing needed to support a preliminary determination that there may be other similarly situated individuals who should be notified of their opportunity to join this suit as plaintiffs. In each of the three affidavits, the only mention of other perspective members is the following sentence. "I have knowledge and belief that the other non-managerial employees also worked over forty hours per week and were not compensated for any hours over forty." That's in the Velasquez affidavit at paragraph 9, the Rivera affidavit at paragraph 8 and the Nozario declaration at paragraph 9.

Lacking from the affidavits, however, is the

basis for each of the affiant's alleged knowledge or belief that other defendant employees work over forty hours and are not being properly compensated. In fact, none of the affidavits even reference that there are other members of the putative collection action from their own stores, let alone other purported defendant establishments.

Even the circumstances surrounding the opt-in plaintiff differs from the named plaintiffs. Nozario indicates that his hourly rate was supplemented by a monthly commission. Nozario further alleges that when he inquired about why he was not getting paid overtime, the defendants informed him that commissioned employees were not entitled to overtime. Neither of the plaintiffs indicate that they were paid on a commission basis, so how are they "similarly situated" to Nozario?

The content of these affidavits is in stark contrast to those which court's have found establish the necessary evidentiary showing. For example, in another case of mine, Moore v. Eagle Sanitation, which can be found at 276 FRD 54. It's a case from last year. In that case, I certified a collective action where each named plaintiffs submitted an affidavit which specifically named additional co-workers employed as sanitation workers who were also allegedly not properly

compensated and where each plaintiff stated that his knowledge of the other laborers working in excess of forty hours per week without being compensated for overtime hours, was based upon the fact that they specifically discussed this matter among themselves with the other employees. That's at 276 FRD at 58.

The plaintiffs in this case state that they have knowledge of other employees who have not received overtime compensation. Well, who are those people? What specific observation did the named plaintiffs make to support factually that these fellow workers actually worked more than forty hours a week.

I commend to your attention the decision which I referenced earlier. It's Judge Francis' decision in Guan Ming Lin v. Benihana, 755 F.Supp 2d 504 (SDNY 2010). in that case, the three plaintiffs were current and former employees of Haru Saki Bar, a restaurant owned and operated by the defendant. Two of the plaintiffs, Guan Ming Lin and Zeng Guan Li had been employed by Haru Too as delivery persons since May 2004 and May 2006.

The third plaintiff, Qi Li, was employed by Haru Too, as a delivery person from 2001 until August of 2009. The variation in the plaintiff's base rates of pay was due to their using different types of vehicles to make deliveries. Delivery persons who drove faster

vehicles such as mopeds and motor bikes made higher base salaries while delivery persons who rode bicycles earned lower base salaries.

The plaintiffs also there stated that they had observed other employees not being reimbursed for things like uniform expenses. Plaintiff Lin alleged that his hourly base pay of $4.90 was less than the minimum wage and that he had observed other employees also being paid a base salary which was less than the minimum wage.

In addition, the declarations of all three plaintiffs there stated with regard to tips reported for tax purposes, defendants automatically reported ten percent of all gross sales of food delivered as tips received by delivery persons. Defendants Haru Too, Haru Amsterdam Avenue Corp., Haru Gramercy Park Corp., Haru Park Wall Street Corp., each owned and operated individual Haru restaurants in different locations around New York City.

In that case, Judge Francis found that the threshold question was whether the plaintiffs had shown that the proposed members of the collective action were similarly situated. He noted that the term similarly situated is not defined by the FLSA or its implementing regulations. However, he went on to note that courts have determined that the applicable test is whether the

plaintiffs have established a sufficient factual nexus between their situation and the situation of other putative class -- excuse me -- other putative collection action members. In making such a showing, plaintiffs can rely on the pleadings but only as supplemented by other evidence such as affidavits from named plaintiffs, opt-in plaintiffs or other putative collection action members.

Judge Francis went on to note that "Although the plaintiff need only make a modest showing that the putative collection action members are similarly situated, the evidence must be sufficient to demonstrate that current and potential plaintiffs together were victims of a common policy or plan that violated the law. Furthermore, the plaintiffs supporting allegations must be specific and not conclusory."

In discussing one of the plaintiffs, Mr. Lin, Judge Francis noted that "He provided even less information about other employees whom he stated he had observed being paid a base salary below the minimum wage. It is unclear," Judge Francis noted, "who they are, what their base salary is, whether they are delivery persons or even tipped employees or whether they worked for Haru, Too or another of the Haru restaurants."

He concluded, "Mr. Lin's allegations are thus too conclusory to establish the requisite factual nexus

with other members of the putative collective action."

Judge Francis went onto find that "Neither Qi Li nor either of the other plaintiffs stated in their declarations that they were aware of other employees at any of the Haru restaurants who had not been paid proper overtime wages. The plaintiffs thus failed to allege the requisite factual nexus between individual plaintiff Qi Li's unpaid overtime claim and the treatment of other employees of Haru, Too or the Haru restaurants." And he cited a case, Mendoza 2008 Westlaw 938584 at *2 in which the Court found that the plaintiffs failed to allege sufficient factual nexus where numerous named plaintiffs submitted affidavits stating that they had worked uncompensated overtime but failed to make similar allegations regarding other putative class members.

Judge Francis went on to note that "The plaintiffs in the case before him provided no details regarding the other employees that they had observed beyond the conclusory statements contained in their own declarations. The names, wage rates and tools of the trade expenditures of these employees are unknown," as he said, "and the plaintiffs have failed to submit declarations from any non-plaintiffs stating the amount of their expenses or the impact of those expenses on their wages."

With regard to the notice, Judge Francis noted that, "As part of the motion for collective action certification, the plaintiffs request that the Court approve and order the issuance of notice to all potential collective action members. Because certifying a collective action on any claim in this matter is unwarranted, the Court will not approve any form of notice at this time."

He went on to state that "The plaintiffs also requested that the Court order the defendants to produce the names, last known mailing addresses, alternate addresses, telephone numbers, social security numbers, and dates of employment of all delivery persons employed by the defendants within the last three years."

In issuing his determination on this issue, Judge Francis noted "The broad, remedial purposes of the FLSA and that the Supreme Court has granted district courts broad discretion to authorize notice and discovery in FLSA actions. Even," he says "where a plaintiff's motion to certify an FLSA collective action fails to assert facts sufficient to meet the 216(b) threshold, courts in this district have often ordered the disclosure of contact information for potential opt-in plaintiffs, so that discovery into the collective allegations could continue and the plaintiffs could renew their motion for

certification at a later date." And he cites a case, Castro v. Spice Place, Inc. 2009 Westlaw 229952 at *3 to *5, Southern District of New York, January 30, 2009 in which the Court denied FLSA collective action certification but granted leave to renew the motion once further discovery had been completed.

In reaching his determination, Judge Francis noted that "The plaintiffs in that case alleged that the defendants had committed multiple violations of various provisions of the FLSA and the New York Labor Law with respect not only to them but to multiple additional employees. Although the facts presented do not sufficiently demonstrate the existence of common policies on the part of the defendants, such that collective action certification is warranted at this time, additional facts may emerge during discovery that further supplement the plaintiff's class claims. The Court should therefore, deny the plaintiff's motion for certification without prejudice to renewal at a later time and order the defendants to produce contact information for all delivery persons employed by Haru, Too during the past three years."

Then there was a question as to the extent of what that contact information should consist of because there was a concern expressed, for example, about the

disclosure of social security numbers.

Judge Francis noted that "Courts in the Second Circuit have become progressively more expansive regarding the extent of the employee information they will order the defendants to produce in FLSA collective actions, even at the pre-certification stage."

He cautioned, however, that "The disclosure of employee's social security numbers raises obviously privacy concerns."

In concluding his decision, Judge Francis noted, "Because I do not recommend certifying a collective action with respect to any of the plaintiffs claims, it would unnecessarily violate the privacy rights of Haru, Too's employees to order disclosure of any portion of their social security numbers at this time."

However, the Court did order production of the names, last known addresses and telephone numbers of all delivery persons that had been employed within the past three years.

I find Judge Francis' rationale and conclusion to be persuasive and so I am going to order similar relief here. However, I am restricting this for the time being because once again, there are complete issues in my mind with regard to who is in this class. And so for now, with regard to any employee who has the title of

sales associate or any employee who was performing the work of a sales associate, even without such a title, I am directing the defendants to produce the name, last known address and telephone numbers of those individuals to the plaintiffs and that information is to be turned over within the next ten days. That takes care of the first issue.

MR. LABUDA: Your Honor, can I make one comment?

THE COURT: Yes.

MR. LABUDA: Just with respect to the telephone numbers --

THE COURT: If you have them.

MR. LABUDA: -- I know that the -- and I am not sure whether or not this was raised in the Benihana case, but clearly there is a disciplinary rule with respect to professional conduct with respect to contacting individuals for the purpose of solicitation via telephone. And that's the --

THE COURT: And that's true in --

MR. LABUDA: -- Rule 7.3. And so I think there's an issue there. Our request would be that we provide the names and the addresses, which doesn't violate the disciplinary rules.

THE COURT: Well, you have a court order -- you

will have a court order in front of you that says I am directing you to turn over the telephone numbers as well. I am also cautioning the plaintiffs that they're not to be contacting anybody through those telephone numbers. Those are purely for purposes of location information, if necessary, that's it.

MR. LABUDA: Okay.

MR. VAGNINI: Understood.

MR. LABUDA: Okay. Thank you, your Honor.

MR. VAGNINI: Understood, your Honor.

THE COURT: Okay. Going over to the motion to quash, this motion obviously is affected by the ruling I just made on the collective action certification motion. Having reviewed the arguments and the applicable case law, I am denying the motion to quash. However, I am going to modify the subpoena and there's several points that need to be made here.

First of all, the failure to give proper prior notice to all parties in this litigation under Rule 45, which by the way, has been interpreted to mean prior to the issuance of the subpoena, and that comes from a case very often cited in these circumstances called Murphy v. Board of Education, 196 FRD 220 at 222. It's a Western District of New York case from 2000.

That was a requirement that should have been

observed. I'm not happy that it was not observed. I am going to modify the subpoena, as I said, but I am cautioning counsel going forward, anything like this that happens in the future, I will impose a sanction. The rules are very clear what prior notice means and what is expected to do.

On the other hand here, it's also been recognized in the Second Circuit that the failure to give notice itself does not automatically preclude the document discovery that is sought. That's from Fox Industries v. Gurovich, a decision of Judge Wall from 2006, it's 2006 Westlaw 2882580 at *11. In that case, the defendant learned of the subpoena as Judge Wall found, prior to the production of the documents and therefore, the defendant was not prejudiced. This, of course, is not to suggest by any means that prior notice -- the prior notice requirement is not important. It is extremely important and I continue to find that it is extremely important which is again why I am cautioning the plaintiff that moving forward should this happen again, I will impose sanctions. So, I want to be very clear on that.

This issue is also addressed in a case called Malinowski (ph.) v. Wall Street Source, Inc. 2010 Westlaw 4967474 at *2. It's a November 23, 2010 case from the

southern district in which the Court said that "Delayed service alone is not a basis to quash a subpoena. The objecting party must also demonstrate prejudice."

And Malinowski cites to an often referenced case in this context called, Kingsway v. Price Waterhouse Coopers, LLP, 2008 Westlaw 4452134, a southern district case from October of 2008.

Here, the intent of the prior notice requirement has been effectuated because the defendants have filed a motion to quash. With regard to that motion, and I said earlier that I am going to modify the subpoena and I am doing so now, the subpoenas as are modified to limit the production to wage information, excluding any social security numbers and dates of birth for Neil Velasquez, Carlos Rivera, and Michael Nozario only for the periods -- the full periods of their employment. I am not requiring records to be produced for anybody else in this matter, given the ruling that I have made regarding the class -- the collective action certification motion.

And moving on now to the status reports that each side filed, and the outstanding issues regarding discovery, Looking first of all to DE-35, which is the March 14 status report from the plaintiffs, with regard to the alleged deficient responses, first of all, under

(a), that issue has been addressed by my ruling on the subpoena. So, I am not going further with that now, as is subdivision (b).

On (c), I will require the defendants to produce the corporate defendant's gross annual revenue or dollar volume, as requested here. You can redact whatever else you need to redact here but for the four named defendant businesses, that information is to be produced. And once again, I ma giving ten days for the production.

On subdivision (d), it says "The defendants have failed to provide information and documents relating to job titles of individuals who held or currently hold the supervisory role over the plaintiffs and additional class members, as well as the store locations where the supervisors worked."

You can disregard the section that says additional class members but I will require the defendants to produce the titles of the individuals who were the supervisors to the three individuals who are in this case at the moment. And also, the store locations where those supervisors worked; once again, within ten days.

With regard to page 3 of this update, and this has to do with an issue that's also mentioned in the

defendant's status report which we'll get to in a moment, there's a real issue here with regard to the burden, who basically shares the burden or has the burden with regard to establishing what these folks were paid and any records to support those contentions.

I certainly would have expected and if this hasn't been done, I will require it to be done, because there's a reference to this in the defendant's letter with regard to the Rule 26(a) calculations. Damages are always an evolving issue during discovery up to the point of trial. What I do expect and I don't know whether this was addressed in the Rule 26(a) disclosures but as I said, if it was not done, it is to be done and you've got ten days to get it done. And that's at least to enumerate the categories of damages that you are looking for. For example, one assumes that you're looking for overtime under the FLSA, overtime under the New York Labor Law. There's also in the complaint, request for liquidated damages, interest, attorney's fees; certainly those categories need to be spelled out and should have been spelled out in the Rule 26(a) disclosures. As I said, if it was not done, it's to be done within ten days.

But I also want to address for a moment the burden here with respect to information concerning hours

worked by plaintiffs when we're talking about an FLSA action. And specifically, the FLSA requires employers to maintain accurate records of the hours and wages of their employees. Section 211(c) requires every employer to make, keep and preserve such records of the persons employed by him and of the wages, hours and other conditions and practices of employment maintained by him.

Section 516.2(a)(7) of the Code of Federal Regulations with regard to FLSA matters, requires that employers maintain records of hours worked each work day and total hours worked each work week by employees. New York State maintains similar record keeping requirements for employers.

Section 661 requires employers -- that's the New York State Labor Law, requires employers to establish and maintain payroll records showing for each week worked, the hours worked, the rate or rates of pay and the basis thereof and in conjunction with the New York Codes, Rules and Regulations, Title 12, Section 142, requires employers to establish, maintain and preserve for not less than six years, weekly payroll records which show for each employee, the number of hours worked daily and weekly including the time of arrival and departure for each employee working a split shift or spread of hours exceeding ten.

In situations where an employer's payroll records are inaccurate or inadequate, an employee has to carry out his burden if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. That's from the famous Anderson case, Supreme Court case, 328 US at 687.

Also, see Reich v. Southern New England Telecommunications Corp., 121 F.3d 58 at 66. That's a 1997 case from the Second Circuit in which the circuit concluded that when a defendant fails to maintain the required employment records, the employee may submit sufficient evidence from which violations of the act and the amount of an award may be reasonably inferred.

As courts have found, a plaintiff can meet this burden by relying on recollection alone. That's from a case called Santian (ph.) v. Kwong Ho 2011 Westlaw 4628752 at *16 and that is a very much referenced case at this point because it also collects the cases on that issue.

The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negatize the reasonable of the inference to be drawn from the employee's evidence. Again, that's from Anderson, 328 US at 687-88.

A similar standard to Anderson is applied in

deciding overtime claims under New York law. See Park v. Soul Broadcasting Systems Corp., 2008 Westlaw 619034 at *8. That's a southern district case from March 6, 2008.

However, the New York standard places a more demanding burden on employers than the FLSA. See Padilla v. Manlapaz, 643 F.Supp 2d. 302 at 307, (EDNY 2009) in which the Court concluded that after the plaintiff meets its burden, the burden then shifts to the employer to prove by a preponderance of the evidence that the plaintiff was properly paid for the hours worked. See also Jiao v. Chi Hua Chen 2007 Westlaw 4944767 at *3, a southern district case from 2007 finding that if an employer is unable to meet its burden under the FLSA, it could not satisfy the burden under New York State law.

What the plaintiffs are required to produce here, if they have them in their possession, are any pay stubs or reasonable facsimile of the pay stubs they receive while working for these businesses. Once they've done that, the rest is up to you, counsel, to explore at a deposition. And I'm certainly -- I don't know -- there's a representation here that documentation has been provided and that what's in the plaintiff's possession has been turned over to the defendants. So, Mr. Vagnini, you need to tell me what that consisted of.

MR. VAGNINI: Whatever payroll records that

they had, pay stubs, anything that they maintained relating to their hours worked and wages was provided. That's all they had.

THE COURT: All right.

MR. VAGNINI: It was substantial. It wasn't everything.

THE COURT: All right. As I said, you're certainly free to inquire well beyond that at a deposition of these folks when the time comes; all right?

MR. LABUDA: Okay. Just so I understand, your Honor, when you were referring to the enumeration of the category of damages, is that -- based on what you just said at the end, I am assuming that that means list out, we're looking for overtime but not a specific number.

THE COURT: Correct.

MR. LABUDA: Okay.

THE COURT: Yes. Again, I expect that number is going to evolve as you go through and they go through depositions here. All right? Because you're going to be relying substantially on their testimony because frankly, their testimony alone is sufficient to move the burden over to you; all right? That doesn't mean that that wins the day. It just means it shifts the burden. So -- and you certainly have whatever records you have. That's

been pretty clear throughout. So --

MR. LABUDA: Yes, that had been produced as well.

THE COURT: Yes. And so as I said, you'll take this up at deposition and I suspect at some point, there will be further motion practice.

MR. LABUDA: Your Honor, just one other question, with respect to (c) --

MS. MURRAY: Yes.

MR. LABUDA: -- you -- I don't take very good notes or too quickly, my understanding was we're to produce documents that contain the gross revenues for the four corporate defendant stores at issue and that we're allowed to redact other --

THE COURT: Yes.

MR. LABUDA: -- information.

THE COURT: There are two things they requested. Your financial statement, first of all and the corporate tax return and the bottom line here is, they're looking for the annual gross revenue, I suspect here, to establish whether or not the companies are each doing $500,000 worth of business. That's really all they're entitled to. So you can redact whatever else you need to redact; all right?

MR. LABUDA: Okay.

THE COURT: But for those --

MR. LABUDA: But that would be on --

THE COURT: -- four named business entities, you are to produce that information in redacted form.

MR. LABUDA: And that -- is that on both the financial statements and the tax returns?

THE COURT: Yes.

MR. LABUDA: Okay.

THE COURT: Okay.

MR. LABUDA: All right. Thank you, your Honor.

THE COURT: All right. Moving over to the defendant's status report --

MR. VAGNINI: Your Honor, one issue from our status report. I'm not sure if you were going to reserve the boilerplate objections based on inadmissibility. It's in nearly every response they make. It's relevant at this stage --

THE COURT: Well, did they not respond after that?

MR. VAGNINI: For most of them, no, they did not.

THE COURT: Well, first of all, I am not sure at this point, some of these responses are going to be altered or the need to respond to them is going to be altered to a degree based on the rulings I've made with

regard to the collective action certification. So you need to really all go back and take another look at these but first of all, keeping in mind that the scope of discovery is significantly broader than what is admissible at trial, just because it may not be admissible at trial doesn't mean that it doesn't get produced, if it has any degree of relevancy to what's at stake in the lawsuit.

And with that guidance in mind, I am going to direct you all to go back and take another look at the responses. All right?

MR. LABUDA: Yes, your Honor.

MR. VAGNINI: Yes, your Honor.

THE COURT: Okay. With regard to the defendant's status report which is at DE-34, we've talked now about the computation of damages and what I am looking to have plaintiffs do here in terms of supplementing their Rule 26(a) disclosures because those are significant and Rule 26(a) disclosures, even though they sound like initial disclosures, often become very, very important in summary judgment. So, I want to make sure that those are supplemented and that this issue is addressed. Once again, ten days, okay?

MR. VAGNINI: Yes, your Honor.

THE COURT: With regard to -- I'm on page 2

now, the second paragraph says "Similarly, plaintiffs have objected to document demands and interrogatories requesting information pertaining to the hours they worked and the wages they were paid each week."

With regard to -- I don't know that they have any more documents beyond what they've turned over. To be honest with you, a portion of this would seem to me to be more appropriate for an interrogatory response, as opposed to necessarily asking for a document when they say they've turned over whatever they have.

MR. LABUDA: Right. And there was documents and interrogatories, your Honor.

THE COURT: All right.

MR. LABUDA: That's right.

THE COURT: All right.

MR. LABUDA: So, we did request it in an interrogatory.

THE COURT: Okay. So, I'm not sure -- what was wrong with the interrogatory response? It didn't list any hours?

MR. LABUDA: Correct.

THE COURT: All right. Well, you know what your clients are claiming at this point. Go back and fill in the interrogatories appropriately.

MR. VAGNINI: Sure.

THE COURT: All right.

MR. VAGNINI: Yes, your Honor.

THE COURT: Once again, you have ten days. And again, that will give you a basis to follow-up at deposition. That bottom paragraph on page 2, once again much of the response here, I think has been already determined by virtue of the ruling on the class -- excuse me -- the collective action certification motion.

And I've indicated what's to be turned over at this point and that goes to people who had the title of sales associate or were performing work that would otherwise be considered to be fulfilling that role, as I stated earlier.

All right. I think that brings me to the end of what I intended to go over with you today and I'll certainly leave the floor open for any other issues that you want to address at this point. Let me start with the plaintiffs.

MR. VAGNINI: I don't think we have any other issues relating to any of the status issues. I would assume the Court will post an order on the certification.

THE COURT: You're going to get the -- let's put it this way. You're going to get a summary order that just lists the rulings and you're certainly free if you want a more amplified record with the rationale for

doing so, you can always order a transcript and speak to Ms. Montero, my courtroom deputy and she could make the arrangements for you to order a transcript. All right?

MR. VAGNINI: Yes, your Honor. And hypothetically, I have to consult back with my office, but I believe a lot of the issues that you've addressed can be rectified relatively quickly with a denial. Is it still the Court's opinion that we should renew an entire motion if we, for example, could amend simply or supplement with the facts that were deficient in the original motion, rather than in doing an entire motion again?

THE COURT: I think that since the motion has been denied for fairly substantial reasons, you really need to redo the -- submit a new motion.

MR. VAGNINI: Okay.

THE COURT: All right?

MR. VAGNINI: Yes, your Honor.

THE COURT: All right. Bear with me one second.

MR. LABUDA: I have one issue, your Honor.

THE COURT: Yes, go ahead.

MR. LABUDA: With respect to the motion to quash --

THE COURT: Yes.

MR. LABUDA: -- how should we proceed in terms

of the third -- notifying the third-party that it's been modified? Should there be a letter that is sent by plaintiff's counsel? Can we send the letter?

THE COURT: Let me -- my suggestion to you would be frankly, redo the subpoenas, send a letter to the people on whom you served the subpoenas saying you're withdrawing the original subpoena and you are serving the amended subpoena now, which has been directed by the Court. All right?

MR. LABUDA: Very good.

THE COURT: And before you do any of that, you're going to show it to counsel.

MR. VAGNINI: Yes, your Honor.

THE COURT: All right?

MR. LABUDA: Before.

MR. VAGNINI: Before.

THE COURT: Before, that's right.

MR. VAGNINI: We'll send it together.

THE COURT: That's the magic word. That is the magic word.

MR. LABUDA: Okay. Thank you, your Honor.

THE COURT: All right. Just bear with me for one second.

(Pause.)

THE COURT: I think that's it. Anything

further?

MR. VAGNINI: I don't think so, your Honor.

THE COURT: All right.

MR. LABUDA: That's it, your Honor. Thank you.

THE COURT: I will do my best to get this summary order up between today and tomorrow and as I said, if you need the transcript or want the transcript, talk to Ms. Montero before you leave toady. All right?

MR. VAGNINI: Okay.

MR. LABUDA: Okay.

MR. VAGNINI: Thank you, your Honor.

MR. LABUDA: Thank you.

THE COURT: Have a good rest of the day. Thank you.

(Matter concluded)

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C E R T I F I C A T E

I, LINDA FERRARA, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this **4th** day of **May**, 2012.

Linda Ferrara

Linda Ferrara

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